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May 30, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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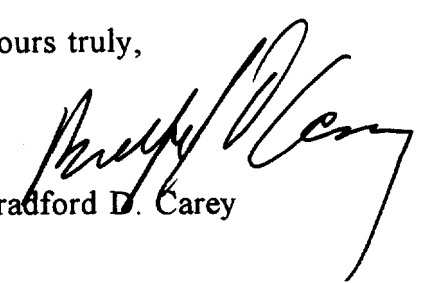
RE: Reply Comments of KSBJ Educational
Foundation - Humble, Texas
MM Docket: 95-31

Dear Mr. Caton:

Enclosed please find the original and fourteen (14) copies of Reply
Comments of KSBJ Educational Foundation for filing with the Commission
in connection with the above-captioned.

If you should have any questions regarding this matter, kindly direct
them to the undersigned.

Yours truly,


Bradford D. Carey

BDC/mv
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Reexamination of the
Comparative Standards for
New Noncommercial Educational
Applicants

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MM Docket 95-31

To: THE COMMISSION

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REPLY COMMENTS OF KSBJ EDUCATIONAL FOUNDATION

KSBJ Educational Foundation (the "Foundation"), by its undersigned Counsel, hereby states its Reply Comments in the captioned proceeding¹. The Foundation is the licensee of NCE-FM station KSBJ, Humble, Texas. KSBJ commenced on air operations in the early 1980's².

As a preliminary matter, the Foundation notes that the Current Commission policies, vague as they are, have not been a total failure; in fact, only a few comparative hearings for new non-commercial stations have ever reached the Commission³. Moreover, the Foundation notes that historically, the

¹As set forth below, the Foundation has extensive experience with the actual application of the Commission's NCE-FM procedures.

²It was almost immediately confronted with massive complaints that it was causing interference to a channel 6 television station's reception. The long process of alleviating the interference included finding a station with which to swap frequencies; then finding a channel for the applicant whose proposed facilities were mutually exclusive with the use of the channel to resolve the mutual exclusivity .

³The most notable case is, perhaps, *Real Life Educational Foundation of Baton Rouge, Inc.*, a proceeding which is still pending.

Commission's "share-time" policy has been rarely imposed.⁴ However, as a stick in the Commission's bag of golf clubs, it offers one more tool to those trying to forge voluntary settlements of NCE comparative cases. It should be retained as an option for ultimate use sparingly by the Commission when the facts of a particular case indicate that it would be the best outcome for the public.

The Foundation believes that even more of the cases with mutually exclusive applications could be settled between the parties, and the public interest advanced, if a slight modification were made to the Commission's application processing and "cut-off" rules for NCE-FM stations⁵.

Presently, once the Commission accepts for filing an application for a new NCE-FM station (or a major change in the facilities of an existing station) (which we shall refer to as "A," and assume is for a new station on channel 204), a thirty day period is commenced for the filing of applications for electrically mutually exclusive facilities. Later, applications found to be acceptable for filing that are

⁴The sharing of time between applicants with "rancorous relations" in *Southeastern Bible College, Inc.*, 49 RR ed 243 (Rev. Bd. 1981) has not been frequently forced.

⁵To anyone who might suggest that the processing of applications is not what the Commission is seeking comments on in this proceeding, the Foundation would respectfully note that the public interest is far better served by amicable resolution of mutually exclusive proceedings by assignment of channels to each applicant than it would be served by application of whatever criteria the Commission may adopt.

mutually electrically exclusive with the first application are listed on a "B cut-off" list. For this discussion, we will assume that one application, "B", was filed and seeks a new station in the same area on channel 205. Only petitions to deny B and applications mutually exclusive with B, but not A (or any other previously cut-off application) may be filed in response to the B cut-off notice.

Under the present policies of the Commission, the parties would be notified by letter of the mutual exclusivity and given an opportunity⁶ to resolve the conflict between themselves, subject to Commission approval. Presently, a settlement should be approved by the Commission if the facilities specified in the settlement are contained within the channels specified in the original applications and the channels adjacent to those specified. (e.g. with A and B above, the parties might be able to resolve the conflict by amending their application to specify channels 203 and 205 with contour protection appropriate for the respective sites).

However, channels which have not been "cut-off" are not available for use by the applicant A and B to resolve the conflict, except if they agree that one will file for another

⁶The Commission's staff has historically been gracious in granting extensions of time for the parties to resolve the conflicts. The Foundation believes that this is a sound policy and extensions of time for the parties to resolve the conflicts should be denied only when one or more parties state that discussions are at an impasse and it (they) do not desire further extensions of time.

available channel (for example channel 217) and dismiss its channel 205 application if the application for channel 217 is uncontested when placed on a cut-off list. All too often this invites yet more applicants to file for a new station, complicating matters further.

The Foundation believes that when a cut-off list is issued that invites applications for a new station in a community (e.g. the A cut-off list for the first applicant), the public is on notice that a new station or stations may be authorized *on some channel(s)* in the area. Thus, the Foundation submits, the Commission may quite properly take the position that the Ashbacker requirements of notice and an opportunity to file competing applications is satisfied, not only with respect to the channels specified in the application(s) and adjacent channels, but *also with respect to other channels in the same service in that area*. Thus, Applicants A and B, if unable to resolve the conflicts with the channels specified in their respective applications, might be able to resolve their conflicts by agreeing⁷ that one application would be amended to specify an unrelated channel in the same area with technical facilities not greater than those specified in the pending applications which have been

⁷The agreement, of course, would be subject to Commission approval.

cut-off. To implement the proposed settlement,⁸ the Commission would publish a notice that a settlement is pending, which proposes resolution of mutually exclusive applications by amendment of an application to the alternate channel (e.g. channel 217 in our example). **No applications for new stations would be accepted in response to this notice.** Licensees (and permittees) of existing facilities would, however, be permitted to file applications for facilities changes that were mutually elusive with the facilities that were first proposed in the settlement⁹.

Adoption of new comparative criteria necessarily involves making hard choices now that will determine which entities will be awarded permits later. Because of the unique nature of non-commercial services, particularly those in the FM reserved band, adoption of selection criteria by the Commission, would necessary pre-judge the relative qualifications of broad groups of people and organizations. For the Commission to adopt now criteria that, for example, would give a preference to one type of applicant over another, would be to prejudice all of the to-be-lesser-ranked applicants

⁸After the Commission determines that the settlement otherwise meets the Commission's Rules and would be in the public interest.

⁹The Foundation submits that those holding authorizations on channels other than those which were originally specified in the applications which were "cut-off" should have an opportunity to file applications for modifications of facilities that are mutually exclusive with facilities first proposed in settlements. However, the Foundation also believes that once the public has been put on notice that a channel for a new station is available in a particular area, the Commission should be able to resolve conflicts by assignment (on request of the applicants) of other, non mutually exclusive, channels.

before the Commission has seen their applications. Therefore, the Foundation believes that any distinction between types of applicants can not be made in a rulemaking proceeding, but rather must be based on the specific entities before the Commission in a particular proceeding, after an evidentiary type hearing, with full right of discovery and cross examination.

Nor should this proceeding to consider the comparative qualifications be permitted to, *sub silencio*, devolve into a revision of the basic criteria.

The Foundation is aware that all too often permittees fail to construct their stations. The Foundation suspects that many times the financial certification of a non-commercial applicant has been based on little more than a hope that the money will be there.¹⁰ Moreover, it is, at best, speculative, whether many applicants have actually performed the required cost analysis.

The Foundation believes that by simply adding the components of the present application for a commercial broadcast station related to the applicant's financial qualifications (FCC Form 301, Section III) to those of FCC Form 340, and by making certain that applicants understand that

¹⁰When considering the financial qualifications of certain commercial applicants and when revising the application for a construction permit to build a commercial broadcast station, the Commission (and its subordinate bodies) have suggested that the financial certification of some applications could not have been based on anything more substantial than a wink and crossed fingers. The Foundation believes that the same can be said for all too many non-commercial applications.

they will be required to exchange full financial certification documentation after the applications are designated for hearing (see §1.325 of the Commission's Rules)¹¹ many speculative filings will be eliminated.

It is in the crucible of hearing that many insincere and unqualified applicants, have been unmasked and questions of the qualifications of others raised¹². While the Foundation believes that, if possible, the costs and delays of hearings are to be avoided, the Foundation submits that the public interest demands that regardless of the type of an applicant,¹³ it should be after the facts of the specific case are adduced that the Commission determines which applicant would provide a superior service; not beforehand.¹⁴ The relative

¹¹§1.325 of the Commission's Rules does not appear to distinguish between applicants for non-commercial stations and those for commercial stations. The list of the documents that are specified therein to be exchanged, however, appears to be tailored to the typical hearing amongst applicants for commercial facilities. Revision of this section appears to be appropriate.

¹²For example, it was competing applicants and their attorneys, not the Commission or its staff, that ultimately were "...able to convince administrative law judges, who preside at the comparative hearings the FCC holds to choose among competing applicants, and the FCC's Mass Media Bureau, which is a party to every hearing, that many Sunrise/Root applicants may be, in essence, fronts for Sunrise-that Sunrise is still calling the shots for the applicants." See *Broadcasting* July 24, 1989 (pp 30-31).

¹³For example, there is nothing in the record to demonstrate that an applicant that is an educational institution is likely to provide a broadcast service superior to that which would be provided by a non-profit foundation.

¹⁴Various members of the Foundation's Board of Directors are also directors of other non-profit foundations which are applicants for, or holders of, permits to build new NCE-FM stations in other areas. The Foundation generally makes its programming available to certain other stations and attempts to nurture their development. The Foundation's comments reflect its observation of the effects of the

qualifications of various types of basically qualified applicants must not be prejudged.

In conclusion, the Foundation reminds the Commission that only rarely under the present system has a non-commercial comparative case even reached the Commission level. Most cases designated for hearing are amicably settled. Of the few not settled, most have been resolved rather efficiently under the present criteria, to the point of no further appeals being filed. With the modifications of the cut-off rules proposed herein, which would facilitate even more settlements, the need for comparative hearings should be even less. However, the Foundation cautions that the Commission must not adopt rules which favor, by the nature of their being, some applicants over others. The record before the Commission is devoid of documentation as to how one type of group, whether it be an organization or institution, or national, regional or local (or a combination) can be depended on, statistically, to provide a broadcast service which is superior to that which would be provided in a specific case by a differently constituted applicant. Absent proof that there is a correlation between applicant status and programming service, which will hold for each case, any rule which gives one type of applicant a preference over another would be arbitrary, capricious and unlawful. Because speech is *per se* at issue, any criteria which were to give one type of applicant an

present system on these other foundations, as well as itself and the Foundation's analysis of the potential effects of various proposals.

advantage or preference over another could sustain constitutional attack, if at all, only if it was most narrowly tailored to meet a highly compelling governmental interest. There is no basis in the record of this proceeding to justify such a finding.

The Foundation does not object to the Commission adopting *comparative preferences* that, each by themselves, would be non-dispositive, for the "finders" of a channel; the applicant(s) proposing super coverage in terms of areas and populations; and, to the extent evident, first or second non-commercial (or local) service. In those cases designated for hearing, applicants should be given a period of at least 60 days from designation for hearing to prepare detailed programming and service exhibits. These exhibits should not contradict the application materials but an applicant should be permitted to expand significantly in its exhibits on its application materials.

Respectfully Submitted,

By: _____


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May 25, 1995

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the above and foregoing Reply Comments have been served on the following by mailing a copy of same via U.S. Mail, postage prepaid, this 30th day of May, 1995, addressed as follows:

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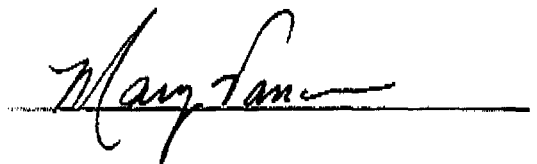
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A handwritten signature in cursive script, appearing to read "Mary Lane", is written over a horizontal line.